

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

8 \* \* \*

9 U.S. BANK NATIONAL ASSOCIATION, AS  
10 TRUSTEE, MASTER ALTERNATIVE  
11 LOAN TRUST 2004-2 MORTGAGE PASS  
12 THROUGH CERTIFICATES, SERIES  
13 2004-2,

14 Plaintiff,

15 v.

16 THUNDER PROPERTIES INC.; DOES 1  
17 through 10, inclusive; ROES Business  
18 Entities 1 through 10, inclusive; and all  
19 others who claim interest in the subject  
20 property located at 3270 Dutch Creek  
21 Court, Reno, NV, 89509,

22 Defendants.

Case No. 3:15-cv-00328-MMD-WGC

ORDER

23 **I. SUMMARY**

24 This case concerns a homeowner association's ("HOA") nonjudicial foreclosure  
25 sale pursuant to NRS § 116.3116 *et seq.* Pending before the Court is Plaintiff U.S. Bank  
26 National Association's Motion for Summary Judgment ("Motion") (ECF No. 18). The Court  
27 has reviewed Defendant Thunder Properties' response (ECF No. 19), Plaintiff's reply  
28 (ECF No. 24), and the accompanying exhibits. The Court also heard oral argument on  
the pending Motion on August 23, 2017. (ECF No. 27.)

For the reasons discussed below, Plaintiff's Motion is granted.

**II. BACKGROUND**

The facts in this case are not at issue.

1 In 2002, 3270 Dutch Creek Court, Reno, NV 89509 (“the Property”) was conveyed  
2 to Phillip Schweber (“Borrower”). (ECF No. 1 at 2-3). On November 26, 2003, Borrower  
3 took out a mortgage loan (“the Loan”) in the amount of \$175,000 from National City  
4 Mortgage Co. (ECF No. 1 at 3.) The Loan was secured by a first deed of trust (“DOT”) on  
5 the Property and was recorded on November 26, 2003 with the Washoe County  
6 Recorder. (ECF No. 1 at 3.) The DOT was assigned to Plaintiff on August 7, 2013 and  
7 recorded as such. (ECF No. 1 at 3.)

8 On July 10, 2013, the HOA recorded a Notice of Delinquent Assessment. (ECF  
9 No. 1 at 4.) On August 14, 2013, the HOA recorded a Notice of Default and Election to  
10 Sell Under Notice of Delinquent Assessment Lien. (ECF No. 1 at 4.) On January 13, 2014,  
11 the HOA recorded a Notice of Sale. (ECF No. 1 at 4.) On March 11, 2014, the HOA  
12 conducted a foreclosure sale, at which Defendant purchased the property for \$6,600.00.  
13 (See ECF No. 1 at 5.) A Trustee’s Deed Upon Sale was recorded on April 8, 2014. (ECF  
14 No. 1 at 5.)

15 At the time of the HOA’s foreclosure sale, the amount owed on the Loan exceeded  
16 \$153,000.00 and the fair market value of the Property exceeded \$181,000.00. (ECF No.  
17 1 at 6.)

18 Plaintiff brings a claim for quiet title and two claims for declaratory relief, asking in  
19 part that this Court declare the HOA foreclosure sale did not extinguish the DOT and that  
20 Plaintiff is still the beneficiary of a first position DOT encumbering the Property. (ECF No.  
21 1 at 7-10.)

### 22 **III. LEGAL STANDARD**

23 “The purpose of summary judgment is to avoid unnecessary trials when there is  
24 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,  
25 18 F.3d 1468, 1471 (9th Cir. 1994) (internal citation omitted). Summary judgment is  
26 appropriate when the pleadings, the discovery and disclosure materials on file, and any  
27 affidavits show “there is no genuine issue as to any material fact and that the moving  
28 party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317,

1 330 (1986). An issue is “genuine” if there is a sufficient evidentiary basis on which a  
2 reasonable fact-finder could find for the nonmoving party and a dispute is “material” if it  
3 could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby,*  
4 *Inc.*, 477 U.S. 242, 248-49 (1986). Where reasonable minds could differ on the material  
5 facts at issue, however, summary judgment is not appropriate. See *id.* at 250-51. “The  
6 amount of evidence necessary to raise a genuine issue of material fact is enough ‘to  
7 require a jury or judge to resolve the parties’ differing versions of the truth at trial.’” *Aydin*  
8 *Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities*  
9 *Serv. Co.*, 391 U.S. 253, 288-89 (1968)). In evaluating a summary judgment motion, a  
10 court views all facts and draws all inferences in the light most favorable to the nonmoving  
11 party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir.  
12 1986).

13         The moving party bears the burden of showing that there are no genuine issues of  
14 material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In order  
15 to carry its burden of production, the moving party must either produce evidence negating  
16 an essential element of the nonmoving party’s claim or defense or show that the  
17 nonmoving party does not have enough evidence of an essential element to carry its  
18 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd v. Fritz Cos.,*  
19 *Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000) (internal citation omitted). Once the moving  
20 party satisfies Rule 56’s requirements, the burden shifts to the party resisting the motion  
21 to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477  
22 U.S. at 256. The nonmoving party “may not rely on denials in the pleadings but must  
23 produce specific evidence, through affidavits or admissible discovery material, to show  
24 that the dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991),  
25 and “must do more than simply show that there is some metaphysical doubt as to the  
26 material facts.” *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 783 (9th Cir. 2002) (internal  
27 citations omitted). “The mere existence of a scintilla of evidence in support of the plaintiff’s  
28 position will be insufficient.” *Anderson*, 477 U.S. at 252.

1     **IV.     DISCUSSION**

2             Plaintiff argues that the Ninth Circuit Court of Appeals' decision in *Bourne Valley*  
3     *Court Tr. v. Wells Fargo Bank, NA*, 832 F.3d 1154 (9th Cir. 2016), *cert. denied*, 137 S.  
4     Ct. 2296 (2017), requires this Court to declare that the HOA foreclosure sale did not  
5     extinguish Plaintiff's DOT because the sale was conducted under an unconstitutional  
6     statute.<sup>1</sup> (ECF No. 18 at 5; ECF No. 24 at 2.) Defendant responds that the Nevada  
7     Supreme Court's subsequent decision in *Saticoy Bay LLC Series 350 Durango 104 v.*  
8     *Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A.*, 388 P.3d 970 (Nev.  
9     2017), overruled *Bourne Valley* and is binding on this Court. (ECF No. 19 at 11-14.) In  
10    *Saticoy Bay*, the Nevada Supreme Court held that the foreclosure procedures under NRS  
11    § 116.3116 *et seq.* do not violate a first security interest holder's (also referred to as "first  
12    position lienholder") due process rights under both the Nevada and United States  
13    Constitutions. *Saticoy Bay*, 388 P.3d at 972-74. Defendant also argues that if this Court  
14    follows the Ninth Circuit's decision in *Bourne Valley*, then the Court must apply the 1991  
15    version of NRS Chapter 116, which ostensibly requires that an HOA provides reasonable  
16    notice of its intent to foreclose to all lienholders. (ECF No. 19 at 17-20.)<sup>2</sup>

17             The Court finds Defendant's arguments unpersuasive and finds that the  
18    appropriate remedy, consistent with the Ninth Circuit's ruling in *Bourne Valley*, is to  
19    declare that Plaintiff's DOT still encumbers the Property.

20    ///

21    ///

22    ///

---

23             <sup>1</sup>In the alternative, Plaintiff also argues that the HOA foreclosure sale was  
24    commercially unreasonable (ECF No. 18 at 6-8)—to which Defendant responded (ECF  
25    No. 19 at 23-25)—and that Defendant is not a bona fide purchaser for value of the  
26    Property (ECF No. 18 at 8-9)—to which Defendant also responded (ECF No. 19 at 25-  
27    27). The Court will not address these arguments as it finds that *Bourne Valley* properly  
28    disposes of Plaintiff's Motion.

26             <sup>2</sup>Defendant also argues that because Plaintiff received actual notice (yet did  
27    nothing), it is consistent with the ruling in *Bourne Valley* to deny Plaintiff's Motion. (See  
28    ECF No. 19 at 21-22.) However, the Ninth Circuit held in *Bourne Valley* that the opt-in  
notice scheme was facially unconstitutional; therefore, it is irrelevant whether Plaintiff  
received actual notice.

1           **A.     Applicability of *Bourne Valley***

2           In *Bourne Valley*, the Ninth Circuit held that the opt-in notice scheme<sup>3</sup> established  
3 in NRS § 116.3116 *et seq.*<sup>4</sup> is facially unconstitutional because it requires a lender with a  
4 first position deed of trust to affirmatively request notice of an HOA's intention to foreclose,  
5 which the court found to be a violation of the lender's due process rights. 832 F.3d at  
6 1156. The Ninth Circuit made this decision in light of the Nevada Supreme Court's  
7 decision in *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 412 (Nev. 2014), in  
8 which the state supreme court interpreted the statute to give an HOA a "superpriority" lien  
9 on a homeowner's property for up to nine months of unpaid HOA dues that, when  
10 foreclosed upon, extinguished all junior interests in the property. *See Bourne Valley*, 832  
11 F.3d at 1156-57. Thus, the Ninth Circuit found that enactment of the statute's opt-in notice  
12 scheme "unconstitutionally degraded [the first position lienholder's] interest" and that but  
13 for this scheme the first position lienholder's rights in the property would not be  
14 extinguished. *Id.* at 1160.

15           As noted previously, Defendant argues that the *Bourne Valley* decision is not  
16 binding on this Court and that this Court is instead bound by the *Saticoy Bay* decision  
17 because federal courts are bound by the decisions of a state's highest court when  
18 interpreting state law. (ECF No. 19 at 11-12.) However, the *Bourne Valley* opinion does  
19 not constitute an interpretation of state law. Rather, the Ninth Circuit relied on the  
20 interpretation of the statute as espoused by the Nevada Supreme Court in *SFR*  
21 *Investments Pool 1* to find that the statute's opt-in notice scheme was unconstitutional  
22 under the federal constitution. *Bourne Valley*, 832 F.3d at 1157. Moreover, to the extent  
23 that the Nevada Supreme Court found the statute to be constitutional under the federal  
24 constitution, this Court is not bound by the state supreme court's determination. *See*

25     ///

---

26           <sup>3</sup>As discussed in Section IV(B), the opt-in notice scheme came into existence  
27 through amendments made by the Nevada legislature in 1993.

28           <sup>4</sup>The *Bourne Valley* court referred to NRS § 116.3116 *et seq.* as "the statute." 832  
F.3 at 1156. Sections 116.3116 through 116.3117 create the framework by which HOAs  
may foreclose on their liens through a nonjudicial sale.

1 *Watson v. Estelle*, 886 F.2d 1093, 1095 (9th Cir. 1989) (stating that the decision of a state  
2 supreme court construing the United States Constitution is not binding on federal courts).

3 Therefore, *Bourne Valley* applies to this Court's determination of whether the  
4 HOA's foreclosure sale extinguished Plaintiff's DOT.

5 **B. Return to Notice Scheme in 1991 Version of NRS § 116.3116 *et seq.***

6 Defendant next argues that because the Ninth Circuit ruled that the opt-in notice  
7 scheme found in the 1993 version of NRS 116.3116 *et seq.* was unconstitutional, the  
8 "notice scheme" should return to that embedded in the 1991 version of the statute. (See  
9 ECF No. 19 at 14-15.) In 1993, the Nevada legislature added or altered the relevant  
10 notice provisions overturned by the Ninth Circuit Court of Appeals in its *Bourne Valley*  
11 decision, specifically NRS §§ 116.31163, 116.311635, and 116.31168. See *Bourne*  
12 *Valley*, 832 F.3d at 1158-1160. Defendant contends that the 1991 version of the statute  
13 includes a "notice scheme" that is predominantly located in NRS § 116.31168 ("the 1991  
14 Statute"). This provision states:

15 The provisions of NRS 107.090 apply to the foreclosure of an association's  
16 lien as if a deed of trust were being foreclosed. The request must identify  
17 the lien by stating the names of the unit's owner and the common-interest  
community. *The association must also give reasonable notice of its intent*  
*to foreclose to all holders of liens in the unit who are known to it.*

18 A.B. 221, 1991 Nev. Stat., ch. 245, § 104, at 570-71 (emphasis added). The last sentence  
19 regarding reasonable notice was then removed by the 1993 amendments.<sup>5</sup> A.B. 612,  
20 1993 Nev. Sta., ch. 573, § 40, at 2373. Thus, Defendant argues that a return to the 1991  
21 Statute requires the Court to determine whether the HOA gave reasonable notice of its  
22 intent to foreclose to all lienholders of the unit that were known to it at that time, meaning  
23 all recorded lienholders. (See ECF No. 19 at 18.) Plaintiff counters that the 1991 Statute  
24 suffers from constitutional infirmities similar to those that plagued the opt-in notice  
25 scheme adopted by the 1993 amendments. (See ECF No. 24 at 2, 5.) Consequently, the  
26 ///

27 \_\_\_\_\_  
28 <sup>5</sup>Sections 116.31163 and 116.311635 were created in the 1993 amendments. A.B.  
612, 1993 Nev. Stat., ch. 573, § 40, at 2354-55.

1 provision would be ripe for another Fourteenth Amendment challenge if the Court were  
2 to analyze the HOA's actions under the 1991 Statute.

3 Nevada law does lend support to Defendant's argument that where a statute is  
4 found to be unconstitutional, it is as if the statute was never passed. See *Nev. Power Co.*  
5 *v. Metro. Dev. Co.*, 765 P.2d 1162, 1163-64 (Nev. 1988) ("null and void ab initio," "of no  
6 effect, affords no protection, and confers no rights"). However, the Court declines to  
7 analyze the HOA's actions under the purported notice scheme in the 1991 Statute. To  
8 begin, there is no clear rule or case law requiring this Court to definitively hold that the  
9 1991 Statute's final sentence contains the notice requirement applicable to first position  
10 lienholders during the time period of 1993 to 2015. Secondly, even if the Court were to  
11 accept that the final sentence of the 1991 Statute is the proper standard by which to  
12 analyze whether Plaintiff received adequate notice, the Court agrees with Plaintiff that  
13 this provision is ripe for constitutional consideration. Therefore, analyzing the facts of this  
14 case under the 1991 Statute would require the Court to entertain another set of due  
15 process challenges, which is inconsistent with established precedent holding that courts  
16 ought to construe statutes so as to avoid constitutional infirmities. See *Clark v. Martinez*,  
17 543 U.S. 371, 380-81 (2005) ("[W]hen deciding which of two plausible statutory  
18 constructions to adopt, a court must consider the necessary consequences of its choice.  
19 If one of them would raise a multitude of constitutional problems, the other should  
20 prevail[.]"). Thus, to avoid further constitutional challenges here, the Court declines to  
21 apply the 1991 Statute to the facts of this case, as it is not clear that the legislature created  
22 the 1991 version of the statute or passed the particular amendments in 1993 with first  
23 position lienholders like Plaintiff in mind.<sup>6</sup>

---

24 <sup>6</sup>In fact, a stated purpose of the 1993 amendments was to provide fairer notice to  
25 owners of units in common-interest communities who were delinquent in association  
26 assessments. A.B. 612, Summary of Legislation, 67th Sess., at 27 (Nev. 1993),  
27 [https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB612,1993](https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB612,1993.pdf)  
28 [.pdf](https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB612,1993.pdf). A stated purpose of the section creating the opt-in notice scheme in the 1993  
amendments was to give an individual like a lessee of a unit notice where the lessee  
otherwise did not have notice that the property was to be foreclosed upon. *Id.* at 37. But,  
more generally, the purpose of the amendments was to correct technical errors in the  
1991 version of the law. *Id.* at 49.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17

18  
19  
20  
21  
22  
23  
24  
25

27  
28

1 result is equitable because the purchase of the Property entailed a risk that the statutory  
2 framework that enabled the HOA to sell the Property at such a discounted price would be  
3 found to be unconstitutional (as litigation challenging the constitutionality of the opt-in  
4 notice scheme in federal and state court had already begun). As to the general public,  
5 this remedy is equitable because it preserves market stability. Alternatives such as setting  
6 aside the foreclosure sale would create chaos, as both parties agreed at the hearing on  
7 August 23.

8 Therefore, the Court resolves Plaintiff's quiet title claim in favor of Plaintiff.  
9 Plaintiff's two other claims for declaratory relief are denied as moot.<sup>8</sup>


10 **V. CONCLUSION**

11 The Court notes that the parties made several arguments and cited to several  
12 cases not discussed above. The Court has reviewed these arguments and cases and  
13 determines that they do not warrant discussion or reconsideration as they do not affect  
14 the outcome of Plaintiff's Motion.

15 It is therefore ordered that U.S. Bank National Association's Motion for Summary  
16 Judgment (ECF No. 18) is granted. The Court finds that the HOA foreclosure sale did not  
17 extinguish Plaintiff's DOT, which continues to encumber the Property.

18 The Clerk is instructed to enter judgment in favor of U.S. Bank National Association  
19 on its quiet title claim and close this case.

20 DATED THIS 14<sup>th</sup> day of September 2017.

21  
22   
23 \_\_\_\_\_  
24 MIRANDA M. DU  
25 UNITED STATES DISTRICT JUDGE  
26

27 <sup>8</sup>Plaintiff also brings two claims for declaratory relief, asking this Court to declare  
28 that: (1) the HOA sale did not affect or extinguish their rights or interest in the Property;  
or (2) the HOA sale was not valid, conveyed no legitimate interest to Defendant, and did  
not extinguish Plaintiff's DOT. (ECF No. 1 at 8-9.)